ments and the writ of summons. I do not consider that 0.12 r.6 has any bearing on the conduct of this application as the procedures for setting aside default judgments and the writ of summons are governed by O.13 r.8 and O.12 r.7(1) of the Rules. These two rules do not require the defendants to obtain leave of the Court as a precedent to their application of setting aside the default judgments or the writ of summons. They are at liberty to apply to have such judgments and the writ set aside by the filing of a summons in chambers supported by an affidavit which they have done in this case and procedure-wise, I do not see anything wrong with the steps taken by the defendants to have the default judgments and the writ of summons set aside.

As I have already ruled above that the plaintiff had the capacity to sue at the time the writ was issued and she can give a valid receipt for the debt and since the default judgments have not been shown to have been irregularly obtained, I had dismissed the defendants' application with costs.

Application dismissed.

Solicitors: *Skrine & Co.; Krishnan & Co.*

R. SARASWATHY v. R. PALAKRISHNAN

[O.C.J. (Siti Norma Yaakob J.) April 12, 1985]

[Kuala Lumpur – Originating Summons No. F. 533 of 1984]

Family Law – Application for custody and for maintenance of child – Application made under Law Reform (Marriage and Divorce) Act, 1976 – No pending action for divorce – Application dismissed – Law Reform (Marriage and Divorce) Act, 1976, ss. 88(3) & 93(1).

In this case the plaintiff claimed custody of her infant son under section 88(3) of the Law Reform (Marriage and Divorce) Act, 1976 as well as maintenance for him under section 93(1) of the Act, from the defendant, her husband. The parties had separated and the plaintiff and her son were living separately from the defendant in her parents' home. There was no pending action for divorce between the parties.

Held: (1) as there was no pending action for divorce neither section 88(3) of the Law Reform (Marriage and Divorce) Act, 1976 nor section 93(1) can be invoked;

(2) the plaintiff should have made her application for custody under section 5 of the Guardianship of Infants Act, 1961 but there was no evidence in this case to show that the defendant was unfit to retain custody of his son or that he had abandoned the custody of his son altogether;

(3) the application for maintenance should have been made under section 3 of the Married Women and Children (Maintenance) Act, 1950, but there was no evidence to show that the defendant had neglected or refused to maintain his son;

(4) both on procedure and on the merits, the application should be dismissed.

[*Editorial note:* This case is under appeal to the Supreme Court in M.A. Rayuan Sivil No. 68 of 1985.]

ORIGINATING SUMMONS.

S.P. Ranjan for the plaintiff.
M.S. Murthi for the defendant.

Cur. Adv. Vult.

Siti Norma Yaakob J.: In this Originating Summons, the plaintiff seeks custody of her infant son as well as maintenance for him from the defendant, her husband. The parties to these proceedings were married on November 30, 1974 at the Registry of Marriages, Kuala Lumpur and they commenced cohabitation after they underwent a Hindu marriage ceremony on September 6, 1975. The only issue of the marriage, their infant son and the subject matter of these proceedings was born on February 6, 1979 and at the hearing of this application, he was just 2 weeks away from his 6th birthday.

In December 1980 when the infant was less than a year old, the plaintiff was forced to take him away from the matrimonial home to her parents' home following differences she had with the defendant. However, in an effort to save their marriage, she moved back into the matrimonial home together with their son in November, 1981. Even this did not resolve their matrimonial differences and 2 years later, in December 1983, when their son was about 4 years old, the plaintiff, with the consent of the defendant, moved out of the matrimonial home again to live with her parents, taking along her infant son with her. Since that date, she and her son had been living separately from the defendant in her parents' home.

The plaintiff makes this application under section 88(3) of the Law Reform (Marriage and Divorce) Act, 1976 (the Act), wherein she seeks to take advantage of the rebuttable presumption under the section that custody of a child below the age of 7 years should go to the mother of the child. As there is no pending action for divorce

between the parties, I do not consider that section 88(3) of the Act can be invoked. This is so as the preamble of the Act in part states that the Act is to "amend and consolidate the laws relating to divorce; and to provide for matters incidental thereto". Thus jurisdiction under section 88(3) of the Act can only be invoked if this custody application forms part of the ancilliary relief sought by the plaintiff in a petition for divorce between her and the defendant. As this is not so, she cannot therefore resort to section 88(3) of the Act.

As the marriage between the parties is still subsisting, the plaintiff should have made this application under section 5 of the Guardianship of Infants Act 1961 which confers guardianship of an infant to the father with the mother having care and control of such infant. Nowhere in the affidavit in support of her application has the plaintiff averred to any act done by the defendant as to warrant any fear that the care and control of her son is being threatened and neither has the affidavit shown the defendant to be an unfit father to retain custody of their son. The affidavit however does make reference to matrimonial differences between the parties and to acts of assault inflicted on the plaintiff by the defendant's father. It was because of these differences that the defendant agreed to allow the plaintiff to take their son away to her parents' home in December, 1983 and since that date, the affidavit has not disclosed any fact which points to the defendant being a person unfit to retain custody of his son. On the contrary, the plaintiff admits that the defendant visits the child from time to time but has not stated whether such visits have any adverse effect on the child or that the defendant had threatened to take the child away from the plaintiff's care and control. To that extent, I consider that the defendant's behaviour has in no way given me the impression that he has abandoned custody of his son altogether.

The plaintiff's prayer for maintenance for her son is made under section 93(1) of the Act; and for the same reason that there is no pending action for divorce between the parties, the plaintiff cannot resort to this section. She should have made the application under section 3 of the Married Women and Children (Maintenance) Act 1950, in which case, she must show that the defendant had neglected or refused to maintain his son but there is nothing in her affidavit to show this. Thus, both on procedure and on the merits, I had dismissed this Originating Summons but made no order as to costs. Needless to say should circumstances between the parties change, in the future the plaintiff is at liberty to proceed with the prayers which she sought in this Originating Summons.

Application dismissed.

Solicitors: *Ng Ek Teong & Partners; Syarikat Davidason.*

ABDUL MALIK BIN ABDUL MAJID v. ASNAH BTE. HAMID & ANOR. DAGANG BIN BACHIK v. ABDUL MALIK BIN ABDUL MAJID

[O.C.J. (Shankar J.) April 19, 1985]

[Malacca – Civil Suits No 86 of 1981 and 121 of 1982]

Contract – Contract relating to land – Specific performance – Purchase of undivided share in land subject to letters of administration – Whether purchasers are co-purchasers in a joint venture or mere agent and principal – Distribution of estate under Muslim Law – Private caveat – Assignment of rights – Forfeiture of deposit – Specific performance – Lien – Allegation of fraud – Duty of administrators to obtain best possible price – Damages for breach of contract – Failure of consideration and duty to refund – Parties bound by their pleadings – Onus of proof upon those alleging fraud – Duty of counsel as officer of the court.

Legal Profession – Solicitors – Duty of – Solicitor's duty to explain nature of documents to clients – Solicitor's conflict of interest – Solicitor's duty to inform party to seek independent legal advice – Failure of solicitor to provide party with copy of document executed – Illiteracy of party.

In this case the court had to consider the effect of an agreement executed by the beneficiaries of the estate of the deceased with the two plaintiffs in these two joint actions. The court had also to consider whether the relationship between the said two plaintiffs was that of a principal and agent or whether they were co-purchasers in a joint venture.

Held: (1) no binding contract was ever made between the parties and it is not for the court to make one for the plaintiff;

(2) the evidence shows both parties were under a misapprehension as to what precisely they were selling and at what price;

(3) the terms of the contract were clearly too uncertain to be enforced;

(4) the caveat lodged by the 1st plaintiff must be removed as the third co-owner of the land in question had no dealings whatsoever with the plaintiff and there was no reason why the third co-owner should ever have been encumbered with the caveat;